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NO. 71-112

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

GEORGE SERIAN GEBHART, DAVID FLEMING WHITFIELD, AND HAROLD CORDELL SMITH,
Petitioners,

vs.

UNITED STATES OF AMERICA.

On Petition For a Writ of Certiorari To The United States Court of Appeals for The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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The United States on page 3 of its printed Brief in Opposition to the Petition for Writ of Certiorari contends that "The contention was never raised on Petitioners' Pre-Trial Motions to suppress evidence . . . and thus was never presented to the trial court." This argument was first raised by the United States in its Brief in Opposition, and the purpose of this Reply Brief is to point out the factual inaccuracy of this statement and argument.

Petitioners first filed a Motion to Suppress Evidence (App. 11a) and therein stated that the search warrant was invalid in the following respects: "that the said warrant

was based solely on the Affidavit of John M. Barry, which was attached thereto, which Affidavit fails to state any offense against the laws of the United States upon which the United States Commissioner could have found probable cause that any such laws were being violated."

A hearing was held on the Motion to Suppress Evidence and at that hearing the then counsel for Petitioners stated: ". . . Printing on these tickets indicate that they were printed for the Latin Quarter, Newport, Kentucky, by the Globe Ticket Company, Philadelphia. Those are the only two references at all to any interstate shipment and certainly don't indicate any interstate travel, and I think in view of that, the affidavits having in no sense any personal knowledge of Mr. Barry, but being based solely on hearsay, are insufficient in addition to the fact that the property is not the property described." (App. 48a)

During the trial and after the conclusion of the evidence in chief for the United States, the then counsel for the Petitioners made the following Motion (Transcript of Evidence and Proceedings, Volume 3, Pages 496, 497):

> "MR. DAVIES: Well, just a minute, if the Court pleases. I will make another motion.
>
> At the beginning or after the return of the indictment, the defendants filed a motion to suppress the evidence for the reason that there was not sufficient evidence upon which to issue the search warrant. I think that that has now been emphasized. Your Honor, by the testimony that has been introduced here that these bingo cards *certainly carry nothing that would in any manner establish that they were shipped in interstate commerce or if they were, that they were shipped after September 13, 1961, the effective date of this act,* and so for that reason I want to renew my motion at this time and ask the Court to con-

sider it; it won't have to be done now; of course, Your Honor, it can be done at any time. (emphasis added).

THE COURT: Well, I have considered that motion before and the arguments submitted in support of it. Do you have anything else to say on that?

MR. DAVIES: Not on that.

THE COURT: Let that be overruled."

The United States in its Brief in Opposition has taken a viewpoint contrary to logic. If it is contended that there was no interstate travel, it of necessity follows that there can be no date on which travel occurred nor no mode of facility for the travel. The Motion at the conclusion of the government's case clearly shows that the argument with respect to the date of the travel was clearly before the Trial Court and the Trial Court overruled this argument.

CONCLUSION

Petitioners respectfully submit that this Court grant the Petition for Writ of Certiorari.

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